Filed 2/27/09; part. pub. order 3/24/09 (see end of opn.)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SANDRA SHEWRY, as DIRECTOR, etc., Plaintiff and Respondent, v. MARY WOOTEN, as PERSONAL REPRESENTATIVE, etc., Defendant and Appellant.	A120402 (Alameda County Super. Ct. No. RG05208260)

Defendant Mary Wooten, as personal representative of the estate of Merlee Dowe, appeals the judgment entered in favor of plaintiff Sandra Shewry, Director of the California Department of Health Care Services (the Department). After a bench trial, the trial court awarded judgment to the Department on its claim, filed pursuant to Welfare and Institutions Code section 14009.5,[1] for reimbursement of expenditures on health care services provided to Dowe before she died. The trial court awarded judgment to the Department on the ground that its claim was timely because Wooten failed to provide notice of Dowe's death to the Department as required by Probate Code section 9202.[2]

[1] This section mandates that "the department shall claim against the estate of the decedent, or against any recipient of the property of that decedent by distribution or survival an amount equal to the payments for the health care services received or the value of the property received by any recipient from the decedent by distribution or survival, whichever is less." (Welf. & Inst. Code, § 14009.5, subd. (a).)

[2] Further statutory references are to the Probate Code unless otherwise noted. Section 9202 provides that no later than 90 days after letters testamentary are issued, the estate attorney must provide notice of decedent's death to the Department and the Department "has four months after notice is given in which to file a claim." (§ 9202.)

Wooten contends that: (1) the trial court should have barred the Department's evidence on the issue of notice under the doctrine of collateral estoppel; (2) she was prejudiced by the admission of the Department's evidence regarding notice; (3) the trial court misapplied the law and ignored applicable sections of the Probate Code governing the Department's claim; (4) the trial court was predisposed to rule in the Department's favor because it is a state agency. Having thoroughly considered each of appellant's contentions of error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Merlee Dowe received Medi-Cal benefits from January 1991 until her death on May 21, 2003. During that period, the Department paid $200,044.99 through its Medi-Cal program for medical care and treatment provided to Dowe.

On July 28, 2003, the Department sent a Medi-Cal Estate Questionnaire form to Dowe's daughter, Evelyn Sasser. On August 18, 2003, Sasser sent a completed Medi-Cal Estate Questionnaire form to the Department, and included with it a Certificate of Death. The questionnaire disclosed that Dowe owned property worth an estimated $250,000. On December 10, 2003, the Department forwarded to Sasser a detailed claim in the amount of $200,044.99 for Medi-Cal expenses paid on behalf of Dowe. On December 16, 2003, the Department filed in probate court a creditor's claim in the same amount against the Estate of Marlee Dowe.

On September 8, 2003, defendant Mary Wooten, as nominated executor of Dowe's estate, filed a Petition for Probate of Will and for Letters Testamentary and Proof of Holographic Instrument, Alameda County Superior Court case No. RP03115472. On August 12, 2004, the court issued Wooten letters testamentary and appointed her executor of Dowe's estate.

On January 28, 2005, Wooten rejected the Department's claim in its entirety by filing a rejection of creditor's claim. On April 15, 2005, the Department filed a complaint against Wooten as personal representative of Dowe's estate to enforce and

collect money due on its Medi-Cal creditor's claim against Dowe's estate. On August 11, 2006, the Department filed a motion for summary judgment.

On November 27, 2006, the trial court issued an order denying the Department's motion for summary judgment. In its order, the trial court stated: "The Department conceded at the [summary judgment] hearing that, subsequent to . . . Mary Wooten's appointment as the personal representative of the Defendant Estate, she mailed notice to the Department advising of decedent's death thus satisfying her (the personal representative's) obligations under Probate Code section 9202. The Department further conceded at the hearing that it did not, at any point within the time frame prescribed by Probate Code section 9150(c), serve the personal representative with the creditor's claim." The order concluded that the Department failed to bear the burden of proof on each element of its claim, in particular "by failing to demonstrate that the creditor's claim upon which [the Department's] claim is based was filed in the manner mandated by Probate Code section 9150."[3]

A bench trial was held on May 1, 2007. The Department called its tax compliance representative, Estela Contreras. Counsel for the Department showed Contreras Exhibit P, a copy of a letter addressed to the Department from Wooten's attorney and dated August 16, 2004.[4] Contreras testified that if the Department had received Exhibit P, the Department "would have sent a formal claim to the attorney and made a case note to reflect that it did go out on that date." Contreras added that under standard procedures, "all documents that come into the [Department's] Estate Recovery Unit . . . are logged in to the ACMS system and therefore reflected in [the] case notes." Contreras stated that

---

[3] Section 9150 provides that a creditor's claim "shall be filed with the court and a copy shall be served on the personal representative . . . [¶] . . . within the later of 30 days of the filing of the claim or four months after letters issue to a personal representative with general powers." (§ 9150, subds. (b)-(c).)

[4] The letter was attached as Exhibit 1 to a declaration by Wooten's counsel, Angela Morgan, filed in support of Wooten's opposition to the Department's motion for summary judgment which the trial court denied on November 27, 2006.

there was no case note in the file reflecting Exhibit P, which meant that the Department had not received it.

Wooten's counsel Angela Morgan testified that she did not dictate Exhibit P to her secretary. Rather, Morgan stated: "I pretty much told her what to say, and she typed it." Morgan said she believed her secretary at the time was Lynette Lessy but it may have been Dawn Brown. Morgan stated that she did not witness her secretary mail the letter, but added that "I don't see her do half of [the] things in my office, but they always got done."

The trial court filed its statement of decision on November 26, 2007. In its statement of decision, the trial court found that Wooten, as personal representative of the Dowe estate, "did not provide notice of the decedent's death in the manner provided in Section 215[5] that triggered the four months after notice is given in which to file a claim [under section 9202]." The statement of decision also concluded that a concession "by counsel for the Department during a hearing on a motion for summary judgment to the effect that the Department had received . . . notice from [Wooten]" was a mistake, was not binding on the Department at trial, and had not prejudiced presentation of Wooten's case at trial. On November 26, 2007, judgment was entered in favor of the Department in the amount of $200,044.99 plus allowable interest and costs. Notice of entry of judgment was filed on December 5, 2007, and Wooten filed a timely notice of appeal on January 3, 2008.

DISCUSSION

A. Collateral Estoppel

Wooten contends that under the doctrine of collateral estoppel the Department was estopped from re-litigating, at trial, the issue whether Wooten served notice of

[5] Section 215 provides: "Where a deceased person has received or may have received health care . . . the estate attorney, or if there is no estate attorney, the beneficiary, the personal representative, or the person in possession of property of the decedent shall give the Director of Health Services notice of the decedent's death not later than 90 days after the date of death. The notice shall include a copy of the decedent's death certificate. . . ."

administration (notice) upon the Department, citing *Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 346 [listing the "threshold requirements" for application of collateral estoppel]. Wooten bases her contention on the fact that at the summary judgment hearing on November 7, 2006, the Department conceded (1) Wooten served her notice by letter of counsel dated August 16, 2004; and, (2) the Department received the notice. Wooten asserts the trial court "made an absolute ruling" on the issue of notice by incorporating the Department's concessions into its summary judgment order. Further, Wooten asserts the trial judge was bound by the November 7 summary judgment order issued by the same court and therefore the trial court erred by allowing the Department to litigate the issue of notice anew at trial. We disagree.[6]

"Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) "A party who asserts the bar of collateral estoppel bears the burden of demonstrating each of its elements. [Citation.] An earlier ruling 'will be given collateral estoppel effect when (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated and (3) necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits.' [Citation.] [¶] The issue of whether collateral

---

[6] The Department suggests that *People v. Dyer* (1988) 45 Cal.3d 26 controls our analysis of whether collateral estoppel applies on this record. We have reviewed *Dyer* and find it is inapposite. In *Dyer*, the appellate court concluded the trial court reasonably determined that the prosecution's stipulation not to raise the issue of the defendant's prior felonies if the defendant testified at trial did not extend to impeachment of the defendant's character witnesses. (*Id.* at p. 57 [stating that " '[a] party seeking relief from the burdensome effects of a stipulation may, in some cases, be fully protected by interpretation, i.e., by enforcement of the stipulation in a reasonable and nonburdensome way,' " and concluding the trial court's ruling was proper because "it did not purport to release the prosecutor from his stipulation, but merely interpreted it to reflect the probable intention of the parties"].) Unlike *Dyer*, we are not concerned with the probable intent of the parties with respect to a mutually agreed upon stipulation. Rather, the issue presented by Wooten is whether the Department's unilateral concession at summary judgment stage decided the issue of notice for trial purposes.

estoppel applies is itself a question of law, which question we review de novo." (*Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 617-618.)

Here, the second, third and fifth requirements for collateral estoppel are lacking. Regarding the second requirement, the factual question of whether Wooten gave notice was not "actually litigated" by either party on summary judgment. The Department did not list Wooten's failure to give notice among its separate statement of undisputed material facts in support of its motion for summary judgment. (See *O'Byrne v. Santa Monica-UCLA Medical Center* (2001) 94 Cal.App.4th 797, 800 fn.1 [noting that on summary judgment, "any evidence on which the parties wish to rely in support of or opposition to the summary judgment motion must appear in their separate statements of undisputed and/or disputed facts [and] . . . [i]f it does not appear there, ' "it does not exist" ' "].) Nor did Wooten file a counter motion for summary judgment, accompanied by a separate statement of undisputed facts, wherein she contended that she provided notice to the Department. Indeed, the factual question of whether Wooten gave notice was not material to the Department's theory that summary judgment was appropriate because the undisputed facts established that it had filed its creditor's claim with the probate court within four months of being informed of Dowe's death by Evelyn Sasser.

In addition, Wooten failed to carry her burden with respect to the third element required for the application of collateral estoppel. An issue is deemed "necessarily decided" for collateral estoppel purposes if it was not "entirely unnecessary" to the earlier ruling. (See *Lucido v. Superior Court, supra*, 51 Cal.3d at p. 342 [issue was "necessarily decided" for purposes of collateral estoppels where justice court's finding on issue of indecent exposure at revocation hearing "was not 'entirely unnecessary' to the judgment modifying the terms of petitioner's probation"].) Here, by contrast, a factual determination that Wooten gave notice was entirely unnecessary to the trial court's denial of the Department's motion for summary judgment. (*Shively v. Dye Creek Cattle Co.* (1994) 29 Cal.App.4th 1620, 1627 ["The judicial function in summary judgment proceedings focuses on finding issues, not determining them."].)

Similarly, Wooten failed to carry her burden with respect to the fifth element required for the application of collateral estoppel. On a motion for summary judgment the only matter to be determined by the trial court "is whether facts have been presented which give rise to a triable factual issue[] [but] [t]he court may not pass upon the issue itself." (*Pettis v. General Tel. Co.* (1967) 66 Cal.2d 503, 505; see also *Chavez v. Carpenter* (2001) 91 Cal.App.4th 1433, 1448 [stating that on a motion for summary judgment, " ' "the trial court's function is not to find the true facts in the case, but to determine whether a triable issue of fact exists" ' "].) In short, the summary judgment procedure is not "a substitute for the open trial method of determining facts." (*Pettis, supra,* at p. 505.)

Indeed, as the appellate court in *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 766 noted: "The summary judgment procedure is designed to remove issues from the case prior to trial where it is plain that one side or the other has no evidentiary support for its position. The procedure may also be used to adjudicate pure issues of law where the facts are not in dispute. In neither case does a *denial* of the motion finally adjudicate anything except that one party has failed to carry the heavy burden of establishing its entitlement to judgment as a matter of law." Moreover, the non-preclusive effect of a *denial* of summary judgment is "explicitly recognized in the directive that a grant of summary adjudication as to some issues 'shall not operate to bar' relitigation of other issues 'as to which summary adjudication was either not sought or denied.' (Code Civ. Proc., § 437c, subd. (n)(2).)" (*Id.* at p. 766, fn. 18 [also noting in this regard that "[w]e can conceive of no reason to suppose that a denial of summary judgment in whole has any more tendency to bind the hands of the trial judge than a denial in part"].)

In sum, the requirements for the application of collateral estoppel are not met here.[7] Accordingly, the trial court did not err by allowing the Department to present evidence at trial on the issue of notice.

B. Evidence of Notice

Wooten asserts she did not learn until she received the Department's trial brief on the first day of trial that the Department disputed receipt of notice. Wooten asserts she "could not have anticipated [the Department's] newly found argument regarding notice" and contends she was "extremely prejudiced and unduly burdened" by the Department's stance on the issue at trial.

Wooten's claim of prejudice based on unfair surprise is belied by the record. The Department set forth its contention that Wooten failed to provide statutory notice of death in its trial brief dated March 9, 2007. Also, in a separate brief dated March 9, 2007, the Department argued that it was not bound by statements of its counsel at the hearing on the motion for summary judgment. The record indicates that Wooten's counsel received a copy of these documents when the case was called for trial on March 9, 2007. The trial was continued on that day and on several occasions thereafter until it was held on May 1, 2007.

More to the point, pretrial procedures such as discovery and pretrial conference generally prevent any unfair surprise, but if " 'despite diligent preparation and use of these procedures, evidence is introduced which is so important and so wholly outside reasonable anticipation that the other party is harmed by its sudden introduction, *the appropriate remedy is a request for a continuance*.' " (*Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 674.) Here, the trial court expressly offered Wooten's counsel the remedy of a continuance if "there is something out there that you

---

[7] Because Wooten's collateral estoppel claim fails on the merits, we need not address a "threshold issue" as yet undecided by our Supreme Court, namely, whether collateral estoppel " 'even applies to further proceedings in the same litigation.' " (*People v. Barragan* (2004) 32 Cal.4th 236, 253 [noting collateral estoppel traditionally applies to successive prosecutions or rulings from a former action but declining to resolve threshold issue because claim failed for other reasons].)

would have had here in court if you'd known about this ahead of time." However, Wooten did not request a continuance. Accordingly, her claim of unfair surprise fails.

Wooten also contends the trial court's finding that she did not provide notice to the Department "is preposterous" and contrary to the "mailbox rule." We disagree. Under Evidence Code section 641, "[a] letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." However, "a presumption of receipt is rebutted upon testimony denying receipt." (*Bear Creek Master Assn. v. Edwards* (2005) 130 Cal.App.4th 1470, 1486.) Where the record reflects testimony denying receipt of the document in issue, " ' "the presumption is gone from the case [and] *[t]he trier of fact must then weigh the denial of receipt against the inference of receipt arising from proof of mailing and decide whether or not the letter was received*." ' " (*Craig v. Brown & Root* (2000) 84 Cal.App.4th 416, 422; see also Evid. Code, § 604 ["The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without regard to the presumption. . . ."].) Our review of the trial court's factual finding that the Department did not receive notice is limited to determining whether such finding is supported by substantial evidence. (*Edwards v. Edwards* (2008) 162 Cal.App.4th 136, 141 ["On review for substantial evidence, we examine the evidence in the light most favorable to the prevailing party and give that party the benefit of every reasonable inference."].)

In this case, the presumption of receipt was rebutted by the testimony of the Department's tax compliance representative, Estela Contreras. Contreras testified on personal knowledge that "all documents that come into the [Department's] Estate Recovery Unit . . . are logged in to the ACMS system and therefore reflected in [the] case notes." Further, Contreras stated that there was no case note in the file reflecting notice from Wooten. On the other hand, the testimony of Wooten's counsel Angela Morgan established that Morgan did not dictate the letter in question to her secretary, was unsure

who her secretary was at the time, and did not attest to actually mailing the letter or to having personal knowledge it was mailed. On this record, we cannot say the trial court erred when it resolved the conflicting evidence in favor of the Department and found that the Department did not receive notice from Wooten. (Cf. *Bonzer v. City of Huntington Park* (1993) 20 Cal.App.4th 1474, 1478,1480-1481 [trial court's finding that notice was actually received was erroneous where evidence notice *had not* been received was "neither impeached nor contradicted" and where the only evidence of receipt was a proof of service declaration stating that under law firm's procedures the letter " '*would be* deposited with U.S. Postal Service' " but declarant "did not attest to actually mailing the notice[] or to having personal knowledge" it was mailed].)

C. Applicable Sections of the Probate Code

Wooten contends the trial court ignored applicable sections of the probate code in awarding judgment to the Department on its claim. In particular, Wooten asserts the Department's claim was untimely pursuant to section 9100,[8] that the Department failed to comply with the notice requirements under section 9150,[9] and that the Department should have utilized procedures for filing a late claim set forth in section 9103.[10]

---

[8] Section 9100 provides that "[a] creditor shall file a claim before expiration of the later of the following times: [¶] (1) Four months after the date letters are first issued to a general personal representative[; or] [¶] (2) Sixty days after the date notice of administration is mailed or personally delivered to the creditor. . . ."

[9] Section 9150 provides that a creditor's claim "shall be filed with the court and a copy shall be served on the personal representative . . . [¶] within the later of 30 days of the filing of the claim or four months after letters issue to a personal representative with general powers. . . ." (§ 9150, subds. (b)-(c).) Moreover, "[i]f the creditor does not file the claim with the court and serve the claim on the personal representative as provided in this section, the claim shall be invalid." (§ 9150, subd. (d).)

[10] Section 9103 provides in part that a creditor may petition the court to file a claim "after expiration of the time for filing a claim provided in Section 9100 if . . . [¶] [t]he personal representative failed to send proper and timely notice of administration of the estate to the creditor, and that petition is filed within 60 days after the creditor has actual knowledge of the administration of the estate." (§ 9103, subd. (a)(1).)

Wooten's reliance on sections 9100, 9103 and 9150 is misplaced. Sections 9100, 9103 and 9150 are found under Chapter 1 of Part 4 of Division 7 of the Probate Code and are among the general provisions governing creditors' claims. The Department's claim, on the other hand, is governed by the *specific* provisions for creditor's claims by *public entities* found under Chapter 5 of the same part—sections 9200 to 9205.

Section 9200 provides: "*Except as provided in this chapter* [Chapter 5], a claim by a public entity shall be filed within the time otherwise provided in this part. . . ." (§ 9200, subd. (a)., italics added.) Section 9201 states: "Notwithstanding any other statute, if a claim of a public entity arises under a law, act, or code listed in subdivision (b) [¶] . . . [¶] [t]he claim is barred *only after written notice . . . to the public entity and expiration of the period provided in the applicable section.* If no written notice or request is made, the claim is enforceable by the remedies, *and is barred at the time, otherwise provided in the law, act, or code*. . . ." (§ 9201, subd. (a)(1), italics added.) Subdivision (b) under the heading "Law, Act or Code" lists the "Medi-Cal Act (commencing with Section 14000 of the Welfare and Institutions Code)" and states that Section 9202 is the "Applicable Section" governing claims brought pursuant to Section 14000 of the Welfare and Institutions Code. (§ 9201, subd. (b).) Section 9202 mandates that a personal representative or estate attorney must provide notice to the Director of Health Services of the decedent's death within 90 days of the date letters testamentary are issued. (§ 9202.) The Director then "has four months after notice is given in which to file a claim." (§ 9202, subd. (a).)

Under the well-established rule of statutory construction, "a specific statute controls over a general statute covering the same subject." (*Neuwald v. Brock* (1939) 12 Cal.2d 662, 669; *Rose v. State of California* (1942) 19 Cal.2d 713, 724 ["A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates."].) Contrary to Wooten's assertions, therefore, the Department's claim is not governed by the general provisions governing creditors' claims found elsewhere in Part 4: Rather, it falls under Chapter 5's

specific provisions for claims by public entities, in particular section 9202. (See *Estate of Starkweather* (1998) 64 Cal.App.4th 580, 587 [noting without discussion that the "applicable section" for claim by public entity the Medi-Cal Act is section 9202 of the Probate Code].) Thus, the trial court correctly determined that section 9202 required Wooten to provide the Department with notice of Dowe's death in order to trigger the four-month time period within which the Department must file a creditor's claim. [11] In sum, Wooten's claim that the trial court ignored applicable sections of the probate code in awarding the Department summary judgment is without merit.[12]

D. Trial Court Bias

Wooten claims the trial court judge was predisposed to rule for respondent because respondent is a state agency. Wooten provides no legal authority in support of this claim. Nor does she articulate the governing legal standards for such a claim. Accordingly, we dismiss it without further discussion. (*Heiner v. Kmart Corp., supra,* 84 Cal.App.4th at pp. 350-351 [where appellant offers "no legal authority to support . . . claim of error, we may reject it out of hand".]

---

[11] Absent notice under section 9202, the Department's claim for reimbursement under Section 14009.5 of the Welfare and Institutions Code is subject to a three-year statute of limitations under Code of Civil Procedure section 338, subdivision (a). (*Shewry v. Begil* (2005) 128 Cal.App.4th 639, 643-644.)

[12] Wooten also contends that the Department's "noncompliance with Probate Code [section] 9100 caused a detriment to the estate" because it denied her the opportunity to file for a hardship waiver. (See Welf. and Inst. Code, § 14009, subd. (c)(1)-(2) [providing for waiver of claim in whole or in part on grounds of "substantial hardship" to dependents or heirs of the decedent and "the opportunity for a hearing to establish that a waiver should be granted"].) However, as discussed above, the Department's claim is governed not by section 9100, but by section 9202. Had Wooten provided notice as required under section 9202, the Department would have sent her a hardship waiver application at that point. We see no grounds for reversal on this ground. Further, Wooten claims that her inability to file a hardship application "violated [the] beneficiary's constitutional rights." We dismiss this claim because Wooten raised it for the first time in her reply brief and also provides no citation to authority in support of such a constitutional claim. (*Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 350-351.)

DISPOSITION

The judgment is affirmed.

_____
Jenkins, J.

We concur:

_____
McGuiness, P. J.

_____
Siggins, J.

Filed 3/24/09

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SANDRA SHEWRY, as DIRECTOR, etc., Plaintiff and Respondent, v. MARY WOOTEN, as PERSONAL REPRESENTATIVE, etc., Defendant and Appellant.	A120402 (Alameda County Super. Ct. No. RG05208260) ORDER GRANTING PARTIAL PUBLICATION

THE COURT:

The request for partial publication of this court's opinion, filed March 17, 2009, is granted. Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion filed February 27, 2009, is certified for publication with the exception of parts A, B and D of the Discussion.

Date: _____ P. J.
McGuiness, P. J.

Justice Jenkins and Justice Siggins concur.

Trial Court:	Alameda County Superior Court
Trial Judge:	Hon. Stephen Dombrink
Counsel for Appellant:	Angela L. Morgan
Counsel for Respondent:	Edmund G. Brown Jr., Attorney General, Douglas M. Press, Senior Assistant Attorney General, Karin S. Schwartz, Supervising Deputy Attorney General, Stephanie H. Walk, Deputy Attorney General